STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES

In Re:	**)**	
APPEAL BY JOHN MICHAEL	**)**	**PRE-HEARING MEMORANDUM**
	)	**FOR COMMISSION STAFF**
	)	

INTRODUCTION

At issue in this appeal is whether the Commission staff erred in concluding that John Michael failed to meet the statutory and regulatory requirements necessary to qualify for Maine Clean Election funds of up to $1.2 million as an unenrolled candidate for Governor in the upcoming general election. The Commission staff's decision denying Mr. Michael's request for certification includes specific findings that 746 of the 2,690 qualifying contributions that he submitted were rejected for a variety of reasons. Those reasons include the fact that 183 of the individuals listed as contributors were not registered to vote; 50 individuals did not make valid qualifying contributions and 18 individuals denied making any contribution at all. Those three grounds alone would be enough to support denial of Mr. Michael's certification request. The staff also found several overarching reasons for denial, including the candidate's failure to "otherwise m[e]et the requirements for participation in the Maine Clean Election Act." The most disturbing of these reasons is the evidence uncovered by the staff in their routine review, which suggests that substantial numbers of contributors may have been misled regarding the nature of the documents they were being asked to sign for the candidate.

Mr. Michael alleges in his appeal that the staff decision contains factual errors and reflects erroneous or overly strict interpretations of the statutes and rules. He contends

that the entire decision was untimely and that he is, therefore, automatically entitled to certification. Finally, he claims that the staff has discriminated against him in the handling of his request for certificiation because of his political views. With respect to each of these claims, [1] Mr. Michael bears the burden of proof in this proceeding.

The Maine Clean Election Act, in Title 21-A, §1125(14)(B), provides that any person challenging a certification decision bears the burden of "providing evidence to demonstrate that the commission [staff] decision was improper." What this means, in effect, is that with respect to legal claims, Mr. Michael has to present arguments to persuade the Commission that the staff made an error of law; and with respect to factual issues, he has to produce sufficient evidence to demonstrate to the Commission that the factual determinations in the staff denial are wrong.[2] To prevail in this appeal, Mr. Michael must demonstrate that the staff decision is wrong with respect to at least 556 of the 746 qualifying contributions that the staff rejected. If the Commission finds at the end of the hearing that even 191 of his contributions are invalid, John Michael could not qualify for the public funding.[3]

In this memorandum, the staff will focus primarily on the legal issues raised by Mr. Michael in his appeal. In addition, we will give a brief overview of the factual

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[1].In his prehearing memorandum, Mr. Michael raises for the first time an objection to the Commission hearing his appeal given that only four of the five positions on the Commission are currently filled, and that none of those members is unenrolled in any political party. Pursuant to Title 21-A section 1125(14)(A), a person challenging a certification decision by the Commission must do so in writing within 7 days of the decision, and "must set forth the reasons for the appeal." Since he did not raise this issue in his appeal of July 7, 2006, he cannot raise it now. Accordingly, we have not addressed this issue in the body of the memorandum.

[2] Specific burden of proof issues with regard to his claim of discriminatory treatment are addressed in part III of this memorandum

[3] By submitting 2,690 qualifying contributions, Mr. Michael left himself a margin of error of only 190, since he needs a minimum of 2,500 to qualify for Clean Election funding.

issues, organized by category, that will be addressed more fully at the hearing on August 1-2, 2006.

STATUTORY AND REGULATORY BACKGROUND

In order to qualify for Maine Clean Election Act funding, a gubernatorial candidate must collect a minimum number of qualifying contributions:

> **3. Qualifying contributions.** Participating candidates must obtain qualifying contributions during the qualifying period as follows:
>
> > A. For a gubernatorial candidate, at least 2,500 verified registered voters of this State must support the candidacy by providing a qualifying contribution to that candidate;
>
> A payment, gift or anything of value may not be given in exchange for a qualifying contribution. A candidate may pay the fee for a money order in the amount of $5, which is a qualifying contribution, as long as the donor making the qualifying contribution pays the $5 amount reflected on the money order. Any money order fees paid by a participating candidate must be paid for with seed money and reported in accordance with commission rules.

21-A M.R.S.A. §1124(3)(emphasis added). The requirement to collect qualifying contributions demonstrates that the candidate has a threshold of voter support.

Qualifying contributions are $5 checks or money orders that meet the following requirements:

> **7. Qualifying contribution.** "Qualifying contribution" means a donation:
>
> > A. Of $5 in the form of a check or a money order payable to the fund in support of a candidate;
> >
> > B. Made by a registered voter within the electoral division for the office a candidate is seeking;

> C. Made during the designated qualifying period and obtained with the knowledge and approval of the candidate; and
>
> D. That is acknowledged by a written receipt that identifies the name and address of the donor on forms provided by the commission.

21-A M.R.S.A. §1122(7)(emphasis added).

The candidate is required by statute to submit the qualifying contributions to the Commission during the qualifying period "according to procedures developed by the commission." 21-A M.R.S.A. §1125(4). Because Mr. Michael is not enrolled in a political party, his qualifying period was just over seven months long. It began on November 1, 2005, and ended "at 5:00 p.m. on June 2nd of [this] election year." 21-A M.R.S.A. §1122(8)(A).

After the candidate has submitted the qualifying contributions, the Commission staff must make a decision on whether to "certify" that the candidate has qualified to receive public financing. Specifically, under 21-A M.R.S.A. §1125(5) the Commission must make the following determinations:

> **5. Certification of Maine Clean Election Act candidates.** Upon receipt of a final submittal of qualifying contributions by a participating candidate, the commission shall determine whether or not the candidate has:
>
> A. Signed and filed a declaration of intent to participate in this Act;
>
> B. Submitted the appropriate number of valid qualifying contributions;
>
> C. Qualified as a candidate by petition or other means;

> D. Not accepted contributions, except for seed money contributions, and otherwise complied with seed money restrictions;
>
> D-1. Not run for the same office as a nonparticipating candidate in a primary election in the same election year; and
>
> E. Otherwise met the requirements for participation in this Act.
>
> The commission shall certify a candidate complying with the requirements of this section as a Maine Clean Election Act candidate as soon as possible and no later than 3 business days after final submittal of qualifying contributions.

The Maine Clean Election Act *requires* the Commission to adopt rules regarding obtaining qualifying contributions and certificating candidates:

> The commission shall adopt rules to ensure effective administration of this chapter. These rules must include but must not be limited to procedures for obtaining qualifying contributions, certification as a Maine Clean Election Act candidate, circumstances involving special elections, vacancies, recounts, withdrawals or replacements, collection of revenues for the fund, distribution of fund revenue to certified candidates, return of unspent fund disbursements, disposition of equipment purchased with clean election funds and compliance with the Maine Clean Election Act. Rules of the commission required by this section are major, substantive rules as defined in Title 5, chapter 375, subchapter II-A.

21-A M.R.S.A. §1126 (emphasis added). To fulfill this mandate, the Commission has adopted Chapter 3 of its administrative rules. These rules are major substantive, and have been approved by the Maine Legislature.

In addition, the Maine Clean Election Act requires the Commission to adopt procedures and forms to administer the requirements of the Act. *See, e.g.,* Sections 1122(8)(D) (requiring the Commission to provide a form to candidates by which they identify the name and address of the qualifying contributors); and 1125(4) (requiring the

Commission to develop procedures for the submission of qualifying contributions). The Commission has issued a 2006 Candidate Guidebook that summarizes the relevant statutes, rules, and administrative procedures governing candidates.

Pursuant to §1122(8)(D), the Commission established what is known as a "receipt and acknowledgment" ("R&A") form, which fulfills several statutory purposes:

- By signing the form, the *qualifying contributor* affirms that he or she contributed $5 from his personal funds and has received nothing of value in exchange for his/her signature and contribution;
- The form also lists the date of the contribution, which confirms that it was made during the qualifying period as required by §1122(7)(C);
- The form lists the contributor's name and address which is required by §1122(7)(D), and is necessary for the verification that the contributor is a registered voter within the electoral subdivision for the office the candidate is seeking;
- By signing the form, the *candidate* acknowledges the campaign's receipt of the qualifying contribution (§1122(7)(D)) and that the qualifying contributions were received with the knowledge and consent of the candidate ((§1122(7)(C)); and
- The *municipal registrar* uses the form to verify which contributors were registered to vote in the electoral division of the candidate by circling the number of the contributor in the left-most column, entering the total number of verified contributors in the blank line in the lower-right hand corner, and signing the form.

To establish and clarify the procedures for obtaining and submitting qualifying contributions (as required by §1126), the Commission adopted Chapter 3, Section 2, Subsection 4 of its rules. Paragraphs (F) through (H) of that subsection address how the candidates can obtain verification that their qualifying contributors are registered to vote in the electoral division for the office he is seeking.[4]

[4] These requirements are discussed more fully below, in part II(A) of this memorandum.

In adopting rules, procedures, and forms relating to qualifying for Maine Clean Election Act funds, the Commission has attempted to develop rules consistent with the statutory purpose of administering a public financing program that is relatively accessible and allows more citizens to run for public office. Since Maine Clean Election Act funding became available to candidates, six candidates for governor and over 600 legislative candidates have qualified for public funds under the rules and procedures established by the Commission. At the same time, however, the Commission must apply the eligibility requirements *strictly* in order to apply uniform standards to all candidates and to properly safeguard the scarce public funds it administers so that public funds are only received by those candidates who have fulfilled the necessary requirements.

LEGAL AND FACTUAL ISSUES

I. Timeliness of Staff Decision Denying Certification

Mr. Michael asserts that, because the staff decision was not rendered within 3 business days of June 16, when he submitted the materials to complete his filing, his request for certification must be deemed automatically approved.[5]

Subsection 1125(5) of the Clean Election Act states that "the commission shall certify a candidate complying with requirements of this section as a Maine Clean Election Act candidate as soon as possible and no later than 3 business days after final submittal of qualifying contributions." Use of the word "shall" conveys a mandatory obligation, as noted by the Law Court in *McGee v. Secretary of State*, 2006 ME 50, ¶¶ 14-15. In the plain language of subsection 1125(5), however, the Commission "shall

[5] It is unclear to staff whether the candidate actually believed that he had completed his filing by June 16 since his campaign workers came to the Commission offices on June 30th attempting to deliver more information on the registered voter status of several contributors.

certify a candidate *complying with* requirements" of the statute (emphasis added). If, as in this case, the candidate had not complied, then the obligation to certify is not triggered. The mere fact that Mr. Michael arrived after the close of the extended qualifying period on June 16 precluded the start of the 3-day clock.[6]

It is apparent from the statutory language that the purpose of the 3-day requirement is to protect candidates from unnecessary bureaucratic delay. *See Bradbury Memorial Nursing Home v. Tall Pines Manor Associates and Department of Human Services*, 485 A.2d 634, 640-41 (Me. 1984)(time periods in statute for agency to act "serve hortatory purpose of curbing bureaucratic delay"). Thus, a candidate who has met the requirements for certification should be entitled to a Commission decision within 3 days so that he or she may receive their first distribution of public funds. If the Commission fails to act under such circumstances, the candidate may seek a court order compelling the agency to act. The statute does not contain any language suggesting, however, that a failure to act within the 3-day period deprives the Commission of jurisdiction to review the candidate's request and automatically results in payment of up to $1.2 million to a candidate who does not qualify. The courts will not create a sanction for an agency's failure to meet a statutory deadlinewhere none is expressed or implied in the statute. *See Davric v. Maine Harness Racing Commission*, 1999 ME 99, ¶14 (court will not create a remedy where statute is silent regarding failure of an agency to act timely).

[6] In addition, the disorganization of his materials, his failure to submit an alphabetical list of contributors with his request, and his failure to provide the staff with the specific dates on which he submitted R&A forms to local registrars made it impossible for the staff to complete review of the request within 3 business days of June 16.

The Law Court's decision in *McGee v. Secretary of State*, is distinguishable in this respect. In *McGee*, the court held that a statutory deadline for filing citizen initiative petitions with the Secretary of State was mandatory because it stated that the filing "*must* be completed within one year of issuance" (emphasis added). The court found no need to examine whether the Legislature had expressly provided a sanction for noncompliance with that deadline because the statutory language "necessarily implies a prohibition on later filing." 2006 ME ¶16, n. 4. If petitioners only have a right to file within a certain time frame, and fail to do so, there is a strong implication that they have no right or ability to file the same petition later. The correct analogy under the Maine Clean Election Act would be the June 2nd filing deadline for unenrolled candidates seeking to qualify for public funding. If candidates do not meet that deadline, they cannot qualify. Both candidates and petitioners are applicants for government approval and, as such, must meet certain requirements, including applicable deadlines, in order to obtain that approval.

The deadline for an agency to act on an application is inherently different, however. Although the Legislature could choose, as a policy matter, to create a sanction for noncompliance – including automatic issuance of the approval being requested – to date, the Maine courts have not implied such a sanction where it was not expressly provided. *See, e.g., Davric, and Central Maine Medical Center v. Concannon*, 2000 Me. Super. LEXIS 214 (failure of Commissioner to make decision on certificate of need application within statutory time frame warranted a court order forcing a decision but would not affect status of application). The Law Court did not suggest otherwise in *McGee*.

To impose the remedy of automatic certification to benefit a candidate who would not otherwise qualify for public funding would not only be extreme, it would reward noncompliance in conflict with the statutory scheme and would significantly disadvantage Maine's taxpayers.[7]

II. Alleged Factual and Legal Errors in the Staff Decision

A. Interpretation and Application of the Commission's Rules, Chapter 3, §2(4)(H), Regarding Verification of Registered Voter Status of Contributors

Several of Mr. Michael's claims on appeal relate to the rules for verification of registered voter status and the staff's application of those rules. The verification requirement appears in only one section of the Maine Clean Election Act. Section 1125(3) requires that the candidate must obtain – during the qualifying period – qualifying contributions from "verified" registered voters. §1125(3)(A). The statute does not specify how the verification process should occur.

The Commission adopted rules to clarify the verification requirement, in Chapter 3, section 2, subsection 4, paragraphs (F) through (H). Those paragraphs require the candidates to submit the receipt and acknowledgment forms to the municipal registrars before the end of the qualifying period. The municipal registrars then have 10 days after they receive the forms within which to verify the contributors who are registered voters.

Paragraph (H) provides candidates with two reasonable options. The first option in subparagraph (H)(1) is for the candidate to bring the receipt and

[7] Indeed, it would create an incentive for candidates to present their requests in the most disorganized manner possible in order to prevent the staff from being able to make a determination within 3 business days.

acknowledgment forms to the municipal registrars in time so that the *original* forms with the municipal registrar's verification may be submitted to the Commission within the qualifying period – i.e., by 5:00 p.m. on June 2nd. The vast majority of candidates seeking public financing choose to exercise this option, and submit all receipt and acknowledgment forms to the Commission *already* verified by registrars. Mr. Michael apparently was unable to qualify through this method, because such a large proportion of his qualifying contributions were collected close to the June 2 deadline.[8]

The other option, set forth in subparagraph (H)(2), is that the candidate may submit to the Commission by the end of the qualifying period *photocopies* of the receipt and acknowledgement forms that have not been verified, along with a statement that the forms were submitted to the municipal clerks on a *specific* date. The candidate must submit the original R&A forms, verified by these registrars, to the Commission within 10 business days of submitting the unverified forms to the municipal registrar. The statement including the specific dates of submission to each registrar is necessary to determine whether the candidate has submitted the verified forms to the Commission within 10 business days.

Subparagraph H(2) thus provides the candidates with a reasonable grace period of limited length (about two weeks) which allows for after-deadline verification by municipal registrars. Although not expressly contemplated by the statute, it is a legitimate part of the procedures the Commission was authorized to adopt by rule. It reflects a reasonable interpretation of the requirement in §1125(3) that qualifying

[8] Although John Michael had a qualifying period that was more than 7 seven months long within which to collect qualifying contributions, 1,600 of his qualifying contributions (59%) were received in the last 10 calendar days before the June 2 deadline.

contributors be "verified registered voters." Nowhere in the Maine Clean Election Act does the statute contemplate a limitless opportunity to verify that the qualifying contributors are registered voters. [9]

Moreover, the language of paragraph (H) is quite clear that the verification requirements of the rule are mandatory: "The request will be deemed complete and the candidate will be certified *only if*" the procedures in either (H)(1) or (H)(2) are utilized. (Emphasis added). Thus, the candidate can take advantage of this grace period, but only if he adheres to the conditions upon which it is granted. In this case, the candidate failed to meet virtually all of the prerequisites necessary to invoke the grace period. The provision in Chapter 3, §2(4)(H)(2) of the Commission's rules is an *exception* to the general rule that qualifying contributions of "verified registered voters" must be submitted by the end of the qualifying period – June 2nd. As such, it must be strictly applied.

John Michael contends that the staff's interpretation of this rule is in error, and that all he was required to do was to submit the original R&A forms to the Commission within 10 business days of submitting the written statement on June 2nd indicating that he still had R&A forms in municipal registrar's offices waiting to be certified. (Appellant's Prehearing Memo at pp. 12-13). His interpretation flies in the face of the plain language of the rule. Under subparagraph (H)(2), the candidate wishing to take advantage of the 10-day grace period must submit a statement to the Commission

[9] Indeed, section 1125 by itself can be read to require that receipt and acknowledgment forms must be verified at the time they are submitted to the Commission within the qualifying period. Subsection (3) requires: "Participating candidates must obtain qualifying contributions *during the qualifying period* as follows: … at least 2,500 *verified* registered voters of this State must support the candidacy by providing a qualifying contribution to that candidate." (Italics added).

during the qualifying period (i.e., on or before June 2nd) indicating that the R&A forms (referred to in the rule as "signature forms") "*have been submitted to the Registrar(s) for verification on a specific date* and the verified forms will be received by the Commission within 10 business days *thereafter*." (Emphasis added). "[T]hereafter" clearly refers to the "specific date" upon which each form was submitted to the registrar. The meaning of this language is not only plain on its face, but it is also consistent with the general provision in Chapter 3, §2(4)(F)(3) of the rules, requiring registrars to verify the registered voter status of each contributor listed on an R&A form within 10 business days of receiving a request to do so from the candidate. June 16 is the *latest* date by which the candidate may submit any registrar verifications, but each of those verifications must have been completed within 10 business days of the specific date the forms were submitted to the registrar.

The language of the rule is equally plain that R&A forms *may not be submitted to registrars any later than* June 2nd. The candidate must attest to the Commission "during the qualifying period" – i.e., *on or before June 2nd* – that the R&A forms "*have been submitted* to the Registrar(s) for verification." Chapter 3, §2(4)(H)(2)(emphasis added).

If the Commission upholds the staff's interpretation of its rule regarding the 10-business day grace period, it is clear from the facts that many of Mr. Michael's contributions cannot be counted toward the statutory minimum because he failed to comply with that rule in the following respects.

When he delivered his request for certification to the Commission's offices at 4:55 p.m. on June 2nd, John Michael did not have with him any written

statement indicating which R&A forms had been submitted to which registrars and on what dates. He thus failed to meet the first condition to invoke the grace period and, on that ground, everything he submitted after that date (2,121 of his 2,690 contributions) may be rejected as untimely. In the statement that he wrote in the Commission's offices on June 2nd, *after* 5:00 p.m. when the statutory qualifying period closed, Mr. Michael was unable to list the registrars by town, and was unable to identify any specific dates upon which his campaign had delivered the R&A forms to those registrars (see Appendix B to staff decision). He also failed to submit by June 2nd photocopies of a number of the R&A forms that he had sent to municipal registrars for review, thereby supporting denial of 69 contributions.

When he arrived at the Commission's offices shortly after 5:00 p.m. on June 16, Mr. Michael submitted several original R&A forms for which he had never provided copies to the Commission on June 2nd. The staff then learned that numerous R&A forms submitted on June 16 had not, in fact, been supplied to the registrars by June 2nd, and, with respect to many others, it was impossible to tell. Since it was the candidate's obligation to identify the towns and the dates of submission in a written statement by June 2nd, the absence of this information supports denial of 279 contributions.

Mr. Michael would like the Commission to excuse all these failings on the grounds that the rule is directory in nature, or that they constitute *de minimis* violations. As noted above, the staff views the pre-conditions for application of the 10-day grace period to be mandatory. Even if construed as directory, however, the candidate must comply substantially with the requirements. *See McGee, 2006 ME 50,* ¶¶ 13-14. The

facts in this record show that Mr. Michael did not come close to substantial compliance. Instead, he failed to comply with virtually every aspect of the rule set forth in subparagraph (H)(2). In the staff's view, these failures cannot be fairly characterized as *de minimis*.

Since Mr. Michael failed to meet the terms of the grace period provided under the Commission's rules, Chapter 3, §2(4)(H)(2), 535 of the qualifying contributions he submitted must be rejected.[10]

B. Contributors Not Verified as Registered Voters

As shown in the staff decision, local registrars determined that 183 contributors listed on R&A forms were not registered to vote at the address listed on the form. R&A forms containing the names of 17 contributors were never even submitted to local registrars. Accordingly, those were never verified as registered voters and cannot be counted. Ten (10) contributors submitted checks or money orders, but never signed the R&A forms and thus were never verified as registered voters.

Although his prehearing memorandum indicates that John Michael intends to prove that many of the 183 contributors are registered to vote, he has not explained the basis for that claim. Under §1125(14), he bears the burden of providing evidence to show that the Commission staff determination was in error on these grounds.

[10] The defects in these contributions are shown in the table on pages 4-5 of the staff denial as follows: 69 (no photocopies provided on June 2); 29 (no original R&A ever provided); 219 (forms not submitted to local registrars until after June 2nd); 7 (R&A form not submitted to Commission within 10 days of delivery to registrars); 279 (candidate unable to prove, and staff unable to determine, whether R&A forms were submitted to Commission within 10 days of delivery to registrars).

C. Contributions Found Invalid

Several of the grounds for rejection in the staff decision relate to the specific requirements for what constitutes a qualifying contribution. Contributors may pay by personal check, for example, but it must be their own personal funds and it must be made out to the Maine Clean Election Fund. In 19 instances, the staff found that the personal check was not made out to the Fund. In 2 cases, the contribution was for an amount less than $5. Four contributions turned out to be duplicates, and one check was not in the name of the contributor. No check or money order was submitted for 24 contributors who were listed on the R&A forms. Most serious of all, 18 individuals listed on the R&A forms told Commission staff that they did not contribute $5 of their own funds. Instead, they were told by the campaign that no funds were needed, or that the matter was taken care of. All in all, 68 of the 2,690 qualifying contributions submitted by the Michael campaign did not meet the basic requirements for a qualifying contribution.

These 68 are among the 108 reasons for invalidation that Michael plans to contest on factual grounds, according to his pretrial memo (p. 17), but he has yet to indicate what those grounds will be. He has not contested the legal basis for any of these rejections.

D. Late Submission of Certification Materials on June 16

It is undisputed that the R&A forms listing 2,121 contributors verified by local registrars after June 2nd were delivered to the Commission's offices by John Michael and certain of his staff *after* 5:00 p.m. on June 16, 2006. They were less than a full minute late, but the door had automatically locked because it was after official business hours. No one from the Michael campaign called in advance to indicate they might be close to the deadline, and when they arrived, they gave no excuse for being late.

The Commission's regular business hours are from 8:00 a.m. to 5:00 p.m. Monday through Friday. Indeed, the closing time of 5:00 p.m. is specified in numerous places in the Commission's statute and rules. *See e.g.*, 21-A M.R.S.A. §§ 1122(8)(A), 1017(2)(C); and Commission Rules, Chapter 1, §2(2)(A). The qualifying period for gubernatorial candidates is specifically defined in section 1122(8)(A) of the Clean Election Act as "end[ing] at 5:00 p.m. on June 2nd." Since the Commission's rules provide that the grace period for submitting registrar certifications runs for an additional 10 business days, it must be interpreted as 10 days from June 2nd at 5:00 p.m. This deadline applied to all unenrolled candidates competing for the same office; therefore, maintaining a bright line is important.[11]

The Commission may well decide that a 35-second delay constitutes such a minor deviation from the 5:00 p.m. deadline as to be considered *de minimis*, and not reject any contributions on this basis. For this reason, the staff decided to receive John Michael's submission on June 16 and to review those materials, without waiving the deadline or excusing the delay. If the Commission does not find this to be a *de minimis* violation, however, then 2,121 of Mr. Michael's qualifying contributions must be rejected, leaving him with only 529 valid contributions. (*See* Staff Decision, footnote 1).

E. Candidate's Failure to Follow Rules for Participation in the Maine Clean Election Act

In order to certify a candidate for receipt of Clean Election Act funds, the Commission must make a positive finding that "the candidate has … E. Otherwise met the requirements for participation in this Act." 21-A M.R.S.A. §1125(5). This is a catchall provision designed to underscore that candidates must comply with all provisions

[11] An analogy can be drawn to a competitive bidding process, where bids received seconds after the posted time for submission are routinely rejected for this very reason.

of the Maine Clean Election Act in order to qualify for public funding. It does not, in the staff's view, provide a reason to reject an entire certification request for a few minor deviations from the rules, but it does justify rejection in circumstances such as this case where the candidate has demonstrated disregard for numerous fundamental requirements.

1. *Fraudulent Contributions/Misleading Voters*

The most serious of these relates to the 18 individuals who told Commission staff in interviews that they did not, in fact, give $5 of their own funds to the campaign when they signed the R&A forms. Several of these individuals reported that they were told by the campaign worker who presented them with the R&A form that its purpose was to help get John Michael on the ballot; no mention was made of a request for public funding. Most were not asked for the $5 contribution and were not informed of that requirement. The staff intends to present the testimony of two of these individuals at the hearing. Obtaining 2,500 qualifying $5 contributions from registered voters is the essential pre-requisite that a candidate must meet in order to receive up to $1.2 million in taxpayer funds to run a gubernatorial campaign. It is an extremely serious violation of the statute and rules to not inform the voters of the request or of the requirement that they contribute $5 of their own money to support this effort.

Roughly 10% of the contributors interviewed told the Commission staff that they did not give a $5 qualifying contribution to Mr. Michael's campaign. Since the Commission staff was able to interview only a small fraction of the contributors, we are unable to determine the actual number of fraudulent qualifying contributions, but they could be in the dozens or hundreds. For this reason, the staff believes the Commission is

unable to determine whether Mr. Michael has submitted 2,500 valid qualifying contributions, and thus is unable to certify him under 21-A M.R.S.A. §1125(5)(B).

2. *Submission of R&A Forms to Municipal Registrars After the Close of the Qualifying Period*

As noted in part II (B) above, the rules are very clear that R&A forms must be provided to municipal registrars within the qualifying period, even if the candidate avails himself of the grace period for submitting the verified R&A forms 10 business days thereafter. In this case, local registrars contacted Commission staff after June 2nd to report that they had just received R&A forms to review and verify. The campaign never disclosed that they were attempting to do this, and there is no legitimate basis for it. It appears to have been an attempt by the campaign to circumvent the deadline, and, as such, demonstrates a serious failure to meet the requirements of the Act.

3. *Failure to Provide an Alphabetical List of Contributors*

Candidates are required under the Commission's Rules (Chapter 3, §1(B)) to submit an alphabetical list of contributors as part of their request for certification, in order to assist the Commission in its review. Because the statutory time frames are extremely short, this requirement is important. While not a substantive requirement by itself, it is a very important tool to facilitate prompt evaluation of the substantive requirements for certification.

The requirement of an alphabetical list in the Commission's rules is clearly within the scope of the Commission's rulemaking authority under the Clean Election Act. The Act specifically requires the Commission "to adopt rules to ensure effective administration of this chapter," and provides that such rules "must include, but must not be limited to procedures for … certification as a Maine Clean Election Act

candidate." 21-A M.R.S.A. §1126. Section 1125(4) also directs the Commission to develop procedures for submission of qualifying contributions.

Mr. Michael is mistaken in asserting that the list is superfluous "since the Commission puts all of the data into its computer and generates its own alphabetical list." (Appellant's Prehearing Memorandum at p. 10). The Commission staff had to prepare a database in this case precisely because Mr. Michael did not produce an alphabetical list on June 2nd and because the materials he submitted on June 2nd were so disorganized it would have been virtually impossible to conduct a careful review without doing so. The staff did not have to go to such lengths with the other gubernatorial candidates because they had provided the alphabetical list as required and submitted their qualifying contributions in an organized, methodical and timely fashion. This candidate's failure to follow rules that are clearly articulated (and also noted in the Candidate's Guide) should not be excused by the fact that the staff invested a considerable amount of time and extra effort in order to ensure that the candidate's failures did not compromise the substantive review process.

III. Alleged Discrimination

Mr. Michael alleges in his letter of appeal and in his pre-hearing memorandum that the Commission staff denied his request for certification "because he is a conservative, Independent candidate." (*See* Appellant's Prehearing Memo at p. 7.) He offers no support for that statement, nor does he outline what evidence he intends to present at the hearing to support it.

To establish a constitutional equal protection violation premised on selective enforcement of the rules or statute, the party asserting the violation must prove that the challenged decision had a discriminatory effect and was motivated by a discriminatory purpose. *Town of Naples v. Yarcheski*, 2004 ME 100, ¶ 8, 854 A.2d 185, 187; *State v. Dhuy*, 2003 ME 75, ¶¶ 16-17, 825 A.2d 336, 343; *Polk v. Town of Lubec*, 2000 ME 152, ¶¶ 14-16, 756 A.2d 510, 513; *Aucella v. Town of Winslow*, 628 A.2d 120, 124 (Me. 1993). Thus Mr. Michael would need to prove that he was treated differently from similarly situated persons and that the selective treatment was motivated by an impermissible or discriminatory purpose. Impermissible reasons include race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. *Barrington Cove Limited Partnership v. Rhode Island Housing & Mortgage Finance Corp.*, 246 F.3d 1, 7 (1st Cir. 2001); *Rubinovitz v. Rogato*, 60 F.3d 906, 910-12 (1st Cir. 1995).

Where allegations of unequal treatment involve expression of political views protected by the First Amendment, the First Circuit has suggested that the standards of proof set forth by the Supreme Court for employment discrimination cases should apply by analogy. *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 41 (1st Cir. 1992), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This means that Mr. Michael would have to first make out a prima facie case of unequal treatment, showing that other candidates were similarly situated yet treated differently. This would require him to show that his qualifications were comparable to the qualifications of other candidates whose requests for certification were granted. If he were able to make such a showing, the burden would then shift to staff to produce evidence of a legitimate

nondiscriminatory reason for the treating his certification request differently. At that point, Mr. Michael would have the burden of persuading the Commission that those reasons were a mere pretext.

As the First Circuit noted in the context of an agency permitting decision, the "mere denial" of an application to an outspoken political opponent of the agency decision makers:

> is not by itself enough to suggest improper motive. Only when accompanied by other facts, such as that others with no different qualifications were granted a permit, is the allegation sufficiently suggestive of retaliation for First Amendment activity" as to constitute a prima facie showing.

964 F.2d at 42.

To date, Mr. Michael has not articulated how he believes he was treated differently, nor has he shown that any other gubernatorial candidate who was certified to receive public funding was similarly situated. He also has not articulated any basis for believing that Commission staff members are even aware of his political views, let alone that Mr. Michael's political views were a motivating factor in the certification decision. (Indeed, review of the staff decision reveals that it is based entirely on Mr. Michael's lack of compliance with the applicable statutory and regulatory requirements for Clean Election Act candidates.) Without some indication that the appellant is prepared to make a prima facie case of discrimination on these grounds, the Commission should not address his claim.

CONCLUSION

The staff will present testimony, as needed, to rebut the evidence that Mr. Michael may present on the above stated issues at the hearing. We anticipate that Mr. Paul Lavin will testify, so that the Commission members will have an opportunity to ask him

questions regarding the staff's review process and decision. If the Commission has questions regarding the staff's legal interpretations, we will do our best to address those at the hearing as well.

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Respectfully submitted,

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